

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1766

B

AS

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 74-1766

BETTY MARKOWITZ, WALTER MARKOWITZ, and CHARLES
MARKOWITZ, on behalf of themselves and their
sister, ESTELLE POSNER,

Plaintiffs-Appellants,

-against-

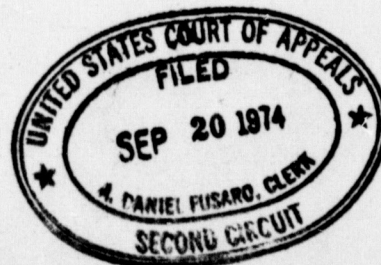
ABE LAVINE, individually and as Commissioner
of the New York State Department of Social
Services,

Defendant-Appellee.

J O I N T A P P E N D I X

JONATHAN A. WEISS
Attorney for Appellants
2095 Broadway, Room 304
New York, New York 10023

BURTON HERMAN
Attorney for Appellee
Assistant Attorney General
of the State of New York
2 World Trade Center
New York, New York 10047



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VERIFIED COMPLAINT

I

PRELIMINARY STATEMENT

1. This action challenges the denial by the New York State Department of Social Services of plaintiff Posner's application for medical assistance on grounds that the denial violated plaintiff Posner's constitutionally guaranteed rights to treatment, travel, due process and association; that the denial violated plaintiffs Walter and Charles Markowitz' constitutionally guaranteed rights of association and due process; and that the denial violated plaintiff Betty Markowitz' constitutionally guaranteed rights of association and parentage. Additionally, plaintiffs claim that the denial of medical assistance to plaintiff Posner violated federal and state laws and regulations.

II

JURISDICTION

2. Jurisdiction is conferred in this Court by 28 U.S.C. §1343, §1331 and §1337. The matter in controversy exceeds in value, exclusive of interests and costs, \$10,000.

3. Plaintiffs' action for declaratory and injunctive relief, and for damages, is authorized by 28 U.S.C. §§2201, 2202 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments, and by 42 U.S.C. §1983, which provides redress for the deprivation under color of state law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the Constitution and laws of the United States.

4. Plaintiffs' federal and state law claims are cognizable by this Court under the doctrine of pendent jurisdiction.

III

PLAINTIFFS

5. Plaintiff Estelle Posner is a citizen of the United States and of the State of New York and a resident of Utica, New York.. Plaintiff lives in the Masonic Home in Utica, New York, and has lived there since August, 1971. She has no assets or income. Her physical and mental conditions have been constantly deteriorating during the past three years to the point where she is no longer able to communicate or perform simple physical acts.

6. Plaintiff Walter Markowitz is the brother of plaintiff Estelle Posner. He is a citizen of the United States and the State of New York and resides at 140-33 34th Avenue, Flushing, New York.

7. Plaintiff Charles Markowitz is the brother of plaintiff Estelle Posner. He is a citizen of the United States and State of New York and resides at 34-15 Parsons Blvd, Flushing, New York.

8. Plaintiff Betty Markowitz is the aged mother of plaintiff Estelle Posner. She is a citizen of the United States and the State of New York and resides at 144-27 35th Avenue, Flushing, New York.

IV

DEFENDANT

9. Defendant Abe Lavine is the Commissioner of the New York State Department of Social Services and is charged by New York Social Services Law, §34 with responsibility for administration and executive functions of the State Department of Social Services. His office is at 2 World Trade Center, New York, New York and provides the basis for jurisdiction of this Court.

V

FACTUAL ALLEGATIONS

10. Plaintiff Estelle Posner, in ill health, was placed in the Masonic Home in Utica, New York, by her husband in August, 1971, with promises she would be cured and returned home soon.

11. The Masonic Home provides only custodial care and does not attempt to remedy the chronic health needs of the persons there confined.

12. During the last 32 months while plaintiff Posner has been confined in the Masonic Home, her mental and physical health has deteriorated markedly. At present she is unable to communicate effectively or to do simple physical acts such as writing her name.

13. During the period that plaintiff Estelle Posner has been confined in the Masonic Home, plaintiffs Walter, Charles and Betty Markowitz have visited her regularly, approximately every forth week. These trips from New York to Utica, a distance of over 200 miles, were made at great expense and inconvenience to plaintiffs Walter, Charles and Betty Markowitz, age 86, and were motivated out of concern, compassion and love for plaintiff Posner.

14. On information and belief, during the last 32 months while plaintiff Posner has been confined in the Masonic Home in Utica, her husband, Maxwell Posner, who works and resides in the New York City metropolitan area, has visited plaintiff Posner rarely, if at all.

15. On or about March 7, 1973, an application for medical assistance was made to the Oneida County Department of Social Services on behalf of plaintiff Posner by her brothers, plaintiffs Walter and Charles Markowitz.

16. On or about April 18, 1973, Oneida County denied plaintiffs' application for medical assistance on the ground that appellant was living in a home where her physical and medical needs were being provided and that Oneida County was the wrong place for application.

17. A request for a hearing was made to the New York State Department of Social Services by plaintiffs Charles and Walter Markowitz on behalf of their sister, plaintiff Posner, in order to challenge the decision of the Oneida County Department of Social Services denying plaintiffs' application for medical assistance.

18. A hearing was held on November 1, 1973, and a decision rendered on December 17, 1973, on behalf of defendant Abe Lavine, Commissioner, by Carmen Shang, Assistant Commissioner, in which defendant Lavine determined that he had no jurisdiction to rule on the merits of the appeal as to the Oneida County Department of Social Services. (A copy of his decision is annexed hereto as Exhibit A.)

19. The reasons enumerated in defendant Abe Lavine's decision of December 17, 1973, in support thereof are:

a) Plaintiff Posner's brothers are not legally responsible for her care and thus lack standing to request a hearing on her behalf;

b) Plaintiff Posner's full needs are being met in the Masonic Home; and

c) Because petitioner resided in New York City prior to her admission to the Masonic Home, New York City and not Oneida County is the public welfare district responsible for her care. See Decision, Exhibit A.

20. Section 358.3(c) of the Regulations of the Department of Social Services (hereinafter referred to as the Regulations) provides that any applicant may be represented by legal counsel, or by a relative, friend or other spokesman. Section 358.5(a) of the Regulations provides that "Any clear written or oral communication to the department by or on behalf of an applicant...requesting review of a social services official's decision, action or failure to act shall constitute a request for a fair hearing..." Section 358.5(b) states the policy of the department that the freedom to make such a request must not be limited or interfered with in any way, and emphasis must be on helping the appellant to submit and process his request and in preparing his case. Furthermore, §358.15(b) states that "An individual or organization...representing an appellant shall have an appropriate written authorization, unless the condition of the appellant makes it impracticable for him to execute such authorization." All these regulations were cited at the hearing to the hearing officer.

21. Plaintiff Posner's physical and mental condition made it impossible for her to request the fair hearing herself or to authorize in writing her brothers to make the request on her behalf.

22. Plaintiff Posner's husband, whom the Commissioner found to be the only person with standing to request a fair hearing on her behalf, has shown no concern with her physical or psychological welfare during the period of confinement.

23. Plaintiffs Walter, Charles, and Betty Markowitz, whom the Commissioner found to lack standing to request and prosecute a fair hearing on behalf of plaintiff Posner, have exhibited great concern and compassion for her physical and psychological condition during the period of her confinement in the Masonic Home. The plaintiffs Markowitz are close relatives, being plaintiff Posner's brothers and mother.

24. The above cited Regulations of the Department of Social Services dictate a liberal policy of the department which necessarily allows relatives, friends or other persons to represent an appellant in a fair hearing proceeding, recognizing the constitutional compulsion of due process to do so. Where the representative is in a close family relationship with the appellant and has shown a continuous concern for the welfare of the appellant, it is a particularly acute abuse of discretion and a contravention of department policy and regulations, state and federal statutes and the United States Constitution, to refuse standing to such a representative.

25. The Masonic Home is not equipped to provide for the medical needs of plaintiff Posner and does not provide for her needs, nor was there any evidence submitted at the hearing upon which a determination could be made that plaintiff Posner's medical needs were being met, nor was there a finding made that she was receiving treatment which would aid her.

26. On information and belief, with proper medical treatment, plaintiff Posner's present physical and mental condition could improve markedly.

27. The Masonic Home in Utica is licensed by the State Department of Health as a Senior Citizen Health Facility. It is not a nursing home or hospital.

28. At the time of plaintiff Posner's application to the Oneida County Department of Social Services for medical assistance, § 62.5(d) of the Social Services Law provided that "When a person, either upon admission to a hospital or nursing home located in a public welfare district other than the district in which he was then residing, or while in such hospital or nursing home, is or becomes in need of medical assistance, the public welfare district from which he was admitted to such hospital or nursing home shall be responsible for providing such medical assistance for so long as such person is eligible therefor. Because plaintiff Posner was not in a hospital or nursing home at the time of her application to the Oneida County Department of Social Services, Oneida County was and is responsible for providing medical assistance to her.

29. Title XIX of the Social Security Law, 42 U.S.C. §1396 et seq, provides that a state plan for medical assistance must be in effect in all political subdivisions of the state and that the plan must be administered by a single state agency; 42 U.S.C. §1396a(a)(1), (5). The New York State Social Services Law, §363 provides that "...a comprehensive program of medical assistance for needy persons is hereby established to operate in a manner which will assure a uniform high standard of medical assistance throughout the state. In carrying out this program every effort shall be made to promote maximum public awareness of the availability of, and procedure for obtaining, such assistance, and to facilitate the application for, and the provision of such medical assistance. Such statutes indicate the state-wide nature of the medical assistance plan and its remedial nature. For both these reasons it is irrelevant for purposes of eligibility in which county plaintiff Posner applied for medical assistance.

VI

FIRST CAUSE OF ACTION

30. The decision of defendant Abe Lavine in declining to rule on the merits of the plaintiff's hearing on the grounds that plaintiffs Charles and Walter Markowitz lacked standing to prosecute said hearing on behalf of their sister, plaintiff Posner, was an abuse of discretion, thereby denying plaintiffs due process of the law as guaranteed by the Fifth, Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States.

VII

SECOND CAUSE OF ACTION

31. The decision of defendant Abe Lavine denying plaintiffs' appeal of the denial of medical assistance by the Oneida County Department of Social Services, in so far as it held that plaintiff Posner's medical needs were being met in the Masonic Home in the absence of any evidence in the record to such effect violated plaintiffs' due process rights as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

VIII

THIRD CAUSE OF ACTION

32. The decision of Abe Lavine denying plaintiff Posner's application for medical assistance despite the fact that her physical and mental condition had been deteriorating constantly during her confinement in the Masonic Home, Utica, New York, and despite the fact that the Masonic Home had not provided her with any medical treatment designed to remedy, alleviate or retard said deterioration of plaintiff's condition violated plaintiff's right to treatment as guaranteed by the Fifth and Fourteenth Amendments to the Constitution of the United States.

IX

FOURTH CAUSE OF ACTION

33. The decision of Abe Lavine denying plaintiff Posner medical assistance on the ground that she applied to the wrong Social Services Department office violated plaintiff's right to travel as guaranteed by the Constitution of the United States.

X

FIFTH CAUSE OF ACTION

34. The decision of Abe Lavine wrongfully denying plaintiff Posner's request for medical assistance so that she could receive medical treatment in a health facility in the area of New York City where the plaintiffs Markowitz reside violates the right of association of plaintiffs Estelle Posner, Walter Markowitz, Charles Markowitz and Betty Markowitz, as guaranteed by the First Amendment of the Constitution of the United States. The denial further impinges upon the constitutionally guaranteed parental rights of Betty Markowitz.

XI

SIXTH CAUSE OF ACTION

35. The decision of Abe Lavine in denying medical assistance to plaintiff Posner violated Title XIX of the Social Security Act which provides that assistance shall be furnished with reasonable promptness to all eligible individuals, 42 U.S.C. §1396a(a)(8).

XII

SEVENTH CAUSE OF ACTION

36. The decision of Abe Lavine in denying medical assistance to plaintiff Estelle Posner on the grounds that her brothers, plaintiffs Charles and Walter Markowitz, did not have standing to prosecute an appeal on her behalf violated the explicit regulations and policy of the New York State Department of Social Services, specifically §§358.3(c), 358.5(a), 358.5(b), and 358.15(b) of the Regulations of the New York State Department of Social Services.

XIII

EIGHTH CAUSE OF ACTION

37. The decision of Abe Lavine in denying medical assistance to plaintiff Estelle Posner on the ground that plaintiff Posner made application for such assistance to the wrong office of the Department of Social Services pursuant to New York State Social Services Law, §62(d) was incorrect in that the Masonic Home in which plaintiff was confined was not a licensed nursing home or hospital so that §62(d) of the Social Services Law as it existed on March 7, 1973, the date of plaintiff's application for medical assistance, was not applicable.

38. Plaintiffs have suffered and continue to suffer grievous and irreparable injury by reason of defendant's arbitrary, capricious, unreasonable, illegal and unconstitutional denial of medical assistance. Plaintiffs have no adequate remedy at law available to them. Plaintiffs have exhausted their administrative remedies.

39. Plaintiffs have filed an action in state court challenging the denial of medical assistance to plaintiff Posner in order to toll the state statute of limitations and preserve their state remedies during the pendency of this federal action. Plaintiffs specifically noted their intent to first pursue this federal court action in their state court petition.

XIV

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully pray that this court:

1. Assume jurisdiction of this cause and set this case down for an early hearing.

2. Pending a hearing and determination grant a temporary restraining order pursuant to Rule 65 of the Federal Rules of Civil Procedure restraining the defendant, his successor in office, agents, and employees, and all other persons in active concert and participation with him, from continuing to cause irreparable harm to plaintiffs by refusing to grant to plaintiff Posner medical assistance benefits in the amount to which she is entitled and would otherwise be receiving except for the erroneous, illegal and unconstitutional decision of defendant Lavine.

3. Enter a final judgment pursuant to 28 U.S.C. §§2201 and 2202 and Rules 54, 57 and 58 of the Federal Rules of Civil Procedure declaring that the action of Abe Lavine in denying medical assistance to plaintiff Posner is invalid in that it violated plaintiffs' rights as guaranteed by the First, Fifth, Ninth, Tenth, and Fourteenth Amendments to the Constitution of the United States; Title XIX of the Social Security Act, 42 U.S.C. §1396a(a)(8); New York State Social Services Law, §62(d); and New York State Department of Social Services Regulations §§358.3(c), 358.5(a), 358.5(b), and 358.15(b).

4. Enter preliminary and permanent injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure. enjoining defendant Lavine, his successors in office, agents and employees, and all other persons in active concert and participation with him from refusing to grant medical assistance to plaintiff Estelle Posner in the amount to which she is entitled were she determined eligible.

5. Grant plaintiffs damages against defendant in the amount of \$50,000 for the pain, suffering and agony caused plaintiffs due to the wrongful denial of medical assistance and the continued physical and mental deterioration of plaintiff Posner which has occurred since the denial of relief.

6. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, allow plaintiffs their costs herein, and also grant them such additional or alternative relief, including payment of all monies wrongfully withheld, as to this Court may seem just, proper and equitable.

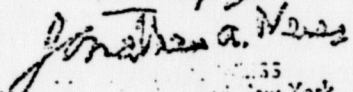
STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

AFFIDAVIT OF WALTER MARKOWITZ

WALTER MARKOWITZ, being duly sworn, deposes and says that he resides at 140-33 34th Avenue, Flushing, New York; that he is one of the plaintiffs herein; that he has read the foregoing complaint and knows the contents thereof and that the same are true of his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.


WALTER MARKOWITZ

Sworn to before me this
29 day of April, 1974.


Jonathan A. Weiss
Notary Public, State of New York
No. 21-007275
Qualified in New York County
Commission Expires March 20, 1975

MOTION FOR PRELIMINARY INJUNCTION

The plaintiffs move this court for an order pursuant to Rule 65 of the Federal Rules of Civil Procedure granting them a preliminary injunction directing the defendant to provide the plaintiff Estelle Posner with medical assistance payments as provided by law pending a hearing and final determination of this action.

Yours, etc.,

JONATHAN A. WEISS, Esq.
Legal Services for the Elderly
Poor
2095 Broadway
New York, NY 10023
(212) 595-1340
Attorney for Plaintiffs

DATED: New York, New York
May 14, 1974

NOTICE OF MOTION

PLEASE TAKE NOTICE that the plaintiff will make the above motion for a preliminary injunction before Judge Inzer B. Wyatt, in Room 1106, United States District Court, Foley

-2-

Square, New York, New York, on Friday, May 31, 1974, at
2:30 p.m.

Jonathan A. Weiss
JONATHAN A. WEISS
Legal Services for the
Elderly Poor
2095 Broadway
New York, NY 10023
(212) 595-1340
Attorney for Plaintiffs

TO: Louis J. Lefkowitz
Attorney General of
the State of New York
2 World Trade Center
New York, New York

--
AFFIDAVIT OF WALTER MARKOWITZ

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

WALTER MARKOWITZ, being duly sworn, deposes and says:

I am the brother of Estelle Posner.

When she was first sent by my brother-in-law to the Masonic Home, she understood, as did I, that she would only be there for a short time, that she was going there for a cure, and that she would return home to New York right away.

Since that time, she has made clear to me in every way that she could that she wants to come back to New York City.

Right now, unfortunately, her condition has deteriorated so that she cannot sign her name and express her sentiments coherently.

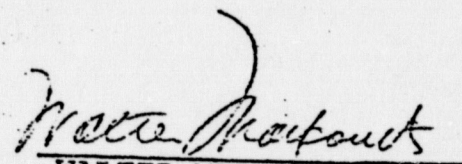
The Masonic Home provides no treatment and its employees have told me they cannot. From my investigations here, I believe that it may be possible to find treatment for my sister that will improve her condition.

My aged mother , I and my brother go up to see my sister in Utica, New York at least once a month. This involves a great deal of hardship for my mother and a great deal of expense for all of us.

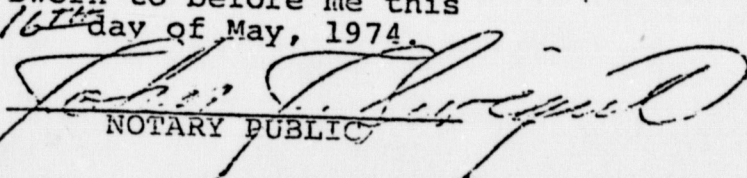
To the best of my knowledge, her husband has visited her rarely, if at all.

I am increasingly frightened by what I see happening to my sister and the terrible affects I see in the spectacle of having my mother go through physical and psychological suffering as a result of seeing my sister in this condition and the trips to Utica. I, myself, am distressed to see that my sister is not being helped and find these trips to be a terrible burden. There is no reason on earth why my sister should be not near her family and no conceivable justification for subjecting my mother to this. It is singularly significant that my sister receive Medicaid in New York to see if she can be helped to some degree.

I beseech this court to issue a Preliminary Injunction to grant my sister Medicaid so that she may have a chance to be cured and be re-united with her family, rather than be left in horrible isolation many miles from her home.


WALTER MARKOWITZ

Sworn to before me this
16th day of May, 1974.


NOTARY PUBLIC

JOHN J. SWIGUT
Notary Public, State of New York
No. 30-3913260
Qualified in Nassau County
~~Commission expires March 30, 1975~~
Commission expires March 30, 1975

STATE OF NEW YORK)

: SS.:

COUNTY OF NEW YORK)

AFFIDAVIT IN OPPOSITION TO
MOTION FOR A PRELIMINARY
INJUNCTION

THOMAS R. McLOUGHLIN, being duly sworn, deposes and
says:

I am an Assistant Attorney General in the office of
LOUIS J. LEFKOWITZ, Attorney General of the State of New York,
attorney for defendant Abe Lavine. This affidavit is made in
opposition to plaintiffs' motion for a preliminary injunction.
Attached hereto is a copy of the decision after fair hearing
made and entered on December 17, 1973.

Plaintiffs are not proper parties to the bringing of
the within action. The husband of the plaintiff is the proper
party, and only party, in whose name the within proceeding may
be brought. He has not seen fit to do so, and the papers are
lacking of any showing that the plaintiff, Estelle Posner,
is not or cannot be sufficiently cared for by the individual
legally responsible therefore, i.e., her husband.

Additionally, plaintiffs have not exhausted their administrative remedies, in that no application has been made to the New York City Department of Social Services for medical assistance. See, Social Services Law, § 62.5(d), and decision after fair hearing attached hereto.

Finally, there has been no showing on the papers submitted on behalf of plaintiff that there is any need or necessity for medical assistance to plaintiff, Estelle Posner, which is not or cannot be supplied by the authorities with whom she is now residing.

For the foregoing reasons, it is respectfully requested that the within motion for a preliminary injunction be denied in its entirety.

THOMAS R. McLOUGHLIN.

Sworn to before me this
31st day of May, 1974

Assistant Attorney General
of the State of New York

STATE OF NEW YORK
DEPARTMENT OF SOCIAL SERVICES

In the Matter of the Appeal of

ESTELLE POSNER

determinations by the Oneida County and New York City
Departments of Social Services

: DECISION
: AFTER
: FAIR
: HEARING

A fair hearing was held at Two World Trade Center, New York, New York, on November 1, 1973, before Michael Cimozelli, Hearing Officer, at which the appellant's representatives and representatives of the New York City Department appeared. The appeal is from determinations of the Oneida County Department of Social Services (hereinafter called the County) and the New York City Department of Social Services (hereinafter called the city) denying an application for medical assistance authorization. An opportunity to be heard having been accorded interested parties and the evidence having been taken and due deliberation having been had, I hereby find:

- (1) Appellant was placed in the Masonic Home in Utica, New York, by her husband in August, 1971.
- (2) On March 7, 1973, an application for medical assistance for the appellant was made to the County by her brothers Walter and Charles Markowitz.
- (3) The County denied the application on April 18, 1973, on the ground that appellant was living in a home where her physical and medical needs are being provided for.
- (4) Appellant was a resident of the City before entering the home in August, 1971. Appellant's only legally responsible relative is her husband, who is a resident of the City and is a party to this hearing.
- (5) No application for medical assistance was made to the City on behalf of the appellant.

(6) A medical report on the appellant dated August 31, 1973, states that the appellee, aged 56, has shown progressive deterioration and is both mentally and physically incompetent to conduct any matters in her own behalf.

(7) The request for the fair hearing was made by appellant's brothers in her name. No application for medical assistance was made to the City by or on behalf of the appellant. Therefore, as to the City, there is no issue to be decided.

Section 101 of the Social Services Law reads as follows:

"1. The spouse or parent of a recipient of public assistance or care of a person liable to become in need thereof shall, if of sufficient ability, be responsible for the support of such person, provided that a parent shall be responsible only for the support of a minor child. Step-parents shall in like manner be responsible for the support of minor step-children.

TELLE POSNER

(2)

"2. The liability imposed by this section shall be for the benefit of the public welfare district concerned or any legally incorporated non-profit institution which receives payments from any governmental agency for the care of medically indigent persons, and such liability may be enforced by appropriate proceedings and actions in a court of competent jurisdiction. Such proceedings and actions may be brought by such an institution in any court wherein a similar proceeding or action could be brought by a public welfare official."

Section 358.2 of the Regulations of the State Department of Social Services provides that a fair hearing is the procedure by which an applicant for assistance and care services may appeal to the State Commissioner of Social Services from certain decisions or actions of a social services official and have a hearing thereon. The parties to the fair hearing shall be the appellant and the social services official whose decision or action is being appealed.

Pursuant to the aforecited section of the Social Services Law, appellant's only legally possible relative is her husband. Any action or proceeding relative to meeting the need care of appellant must be taken by him. Appellant's husband has not requested a fair hearing to review the County's determination and although given notice of the date, time and place of this hearing, refuses to be a party to this proceeding. The request for a hearing made by appellant's brothers in her name. They are not legally responsible for her care and may not request a fair hearing in her name. They, themselves, are not entitled to a hearing as they are not applicants for or recipients of assistance and care. Accordingly, the Commissioner of Social Services may not rule on the merits of this appeal.

It should be noted at this point that Section 360.9(b) of the aforecited Regulations provides in part that full and proper use shall be made of existing public and private medical health services and facilities for obtaining medical and health care, services and supplies. Medical care, services and supplies include those available from or through, amongst others, fraternal benefits. Appellant's full needs are being met in a home maintained by a fraternal organization. Accordingly, the County was correct in its determination to deny appellant's application for medical assistance.

Additionally, Section 62.5(d) of the Social Services Law provides in pertinent part follows:

"(d) When a person, either upon admission to a hospital or nursing home located in a public welfare district other than the district in which he was then residing, or while in such hospital or nursing home, is or becomes in need of medical assistance, the public welfare district from which he was admitted to such hospital or nursing home shall be responsible for providing such medical assistance for so long as such person is eligible therefor."

ELLE POSNER

(3)

Appellant was a resident of the City when she entered the home in Utica in August, 1941. Pursuant to this Section of the law, the County would not be responsible for providing financial assistance to appellant in the event she were to become eligible for such assistance. DECISION: There is no issue to be decided as to the New York City Department of Social Services. The State Commissioner of Social Services has no jurisdiction to rule on the merits of the appeal as to the Oneida County Department of Social Services.

ED: Albany, New York

DEC 17 1973

Abe Lavine
Abe Lavine
COMMISSIONER

BY Carmen Shang
Carmen Shang
ASSISTANT COMMISSIONER

BETTY MARKOWITZ, on behalf of herself
and her daughter ESTELLE FOSNER and
WALTER MARKOWITZ and CHARLES
MARKOWITZ, on behalf of themselves
and their sister ESTELLE FOSNER,
Plaintiffs,

-v-

ASA LAVINE, individually and as
Commissioner of the New York State
Department of Social Services,
Defendant.

74 Civ. 1963

MEMORANDUM OPINION

This is a motion by plaintiffs for a mandatory preliminary injunction directing the defendant, Commissioner of Social Services of New York (Social Services Law ("SSL") § 11), to provide Estelle Fosner ("Estelle") "with medical assistance payments as provided by law". Movants cite Fed. R. Civ. P. 65.

Medical assistance for needy persons is provided for in the New York SSL at Section 363 and following.

Plaintiffs are the two brothers (Walter and Charles) of Estelle, who is married, and the mother (Betty) of Estelle. Whether Estelle is herself a plaintiff is uncertain; the action is in the caption said to be brought on her behalf but in the complaint she is said to be a plaintiff. A medical report dated August 31, 1973, states that Estelle is "mentally and physically incompetent" but no committee, guardian or other representative has been appointed.

In August 1971, her husband Maxwell placed Estelle in the Masonic Home at Utica, New York. She and he had been residents of New York City. He continues to reside in the City and she has resided at the Home in Utica since August 1971.

The status of the Home under SSL is uncertain. It is probably an "intermediate care facility" (SSL § 2(23)); movants say it is a "Senior Citizen Health Facility" but no such definition has been found in SSL; it may be part of the licensing program of the State Department of Health.

On March 7, 1973, the two brothers applied for medical assistance for Estelle to the Oneida County authorities (Utica is in Oneida County). This application was denied on April 18, 1973, on the ground that she did not need medical assistance because the Home was providing it. The application may also have been denied because made to the wrong "public welfare district".

SSL § 62(5)(d) seems to put the responsibility for medical assistance on the public welfare district in which a person resides and to continue that responsibility after such person has been admitted to a hospital or other care facility located in another public welfare district. Thus, the State officials have ruled that an application by Estelle for medical assistance must be made in New York City, rather than in Oneida County.

The two brothers asked for a fair hearing which was held on November 1, 1973, after which there was a decision on December 17, 1973, by the Commissioner. This decision denied any medical assistance on the ground that there had been no application in the New York City public welfare district and that Oneida County was not obligated under Section 62(5)(d) to supply assistance.

Apparently some action was then filed in the State courts but what and where it was has not been disclosed.

This action in this Court was commenced on May 6, 1974, and the present motion followed.

It seems evident that this is no matter for the federal courts. This is a State administrative controversy over medical assistance. For this Court to intervene would invite the management by this Court of the New York medical assistance program - an intolerable situation.

There is no general federal question jurisdiction. 28 U.S.C. § 1331 The State has denied no federally protected rights. Its administrative remedies are available. One fair hearing has already been held and another is available in New York City. If, as movants suggest, the State officials are wrong about the county responsible and in which application should be made, there is a readily available procedure in the State courts to correct the error. CPLR, Article 78 See Corr v. Westchester County, etc., 33 N.Y. 2d 111, 350 N.Y.S.2d 431 (1973) Moreover, it seems evident that the jurisdictional amount is not present.

There is no jurisdiction under 28 U.S.C. § 1343(3) because no substantial constitutional claim is advanced. Glover v. McMurray, 487 F.2d 493, 497 (2d Cir. 1973) Moreover, there has been no exhaustion of State administrative and judicial remedies. Eisen v. Eastman, 421 F.2d 560, 569 (2d Cir. 1969)

28 U.S.C. § 1337 cannot apply because the action has nothing to do with "commerce and anti-trust regulations".

This action in any event does not appear to be brought

by the proper party, namely, Estelle or her committee or guardian. Neither the brothers nor the mother appear to be proper parties. They have no legal interest.

The motion is denied and, for the reasons indicated, the Clerk is directed to enter judgment dismissing the action for lack of jurisdiction of the subject matter and for failure of the complaint to state a claim upon which relief can be granted.

SO ORDERED.

Dated: June 10, 1974

INZER B. WYATT
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
BETTY MARKOWITZ, on behalf of herself
and her daughter ESTELLE POSNER and
WALTER MARKOWITZ and CHARLES MARKOWITZ,
on behalf of themselves and their
sister ESTELLE POSNER

JUDGMENT

74 Civil 1963 (ISW)

Plaintiffs

-against-

ABE LAVINE, individually and as
Commissioner of the New York State
Department of Social Services

Defendant
----- X

The plaintiffs having moved the Court for a preliminary
injunction pursuant to Rule 65 of the Federal Rules of Civil
Procedure, and the said motion having come on to be heard before
the Honorable Inzer B. Wyatt, United States District Judge, and
the Court thereafter on June 10, 1974, having handed down its
memorandum endorsement denying the said motion, and directing the
Clerk to enter judgment dismissing the action, it is,

ORDERED, ADJUDGED and DECREED: That defendant ABE LAVINE,
individually and as Commissioner of the New York State Department
of Social Services, have judgment against the plaintiffs BETTY
MARKOWITZ, on behalf of herself and her daughter, ESTELLE POSNER and
WALTER MARKOWITZ and CHARLES MARKOWITZ, on behalf of themselves and
their sister ESTELLE POSNER, dismissing the action for lack of
jurisdiction of the subject matter and for failure of the complaint
to state a claim which relief can be granted.

Dated: New York, N.Y.
June 19, 1974

Raymond F. Burghardt
CLERK

JUN 20 1974

JUN 19 1974

STATE OF NEW YORK

DEPARTMENT OF SOCIAL SERVICES

-----x

In the Matter of the Appeal of :

ESTELLE PCSNER :

From a Determination by the New York :
City Department of Social Services :
to Medical Assistance. :

-----x

November 1, 1973.
2:00 P.M.

World Trade Center
No. 2 Building
New York, New York 10007

B E F O R E:

MICHAEL CIMORELLI, ESQ.,

Hearing Officer.

Reported by:
Marie Hickey.

CARROTHERS REPORTING SERVICE

128 BROADWAY
NEW YORK, N. Y. 10038

227-2049-9

A P P E A R A N C E S:

FOR THE APPELLANT:

Mrs. Estelle Posner

Appellant (not present)

Mr. Jonathan A. Weiss, Esq.
2095 Broadway
New York, New York 10023

Mr. Robert Caldwell
Masonic Home
Utica, New York

Observer

Mrs. Betty Markwoitz

Mother of Appellant

Mr. Walter Markwoitz

Brother of Appellant

Mr. Charles Markwoitz

Brother of Appellant

FOR THE NEW YORK CITY DEPARTMENT OF SOCIAL SERVICES:

Mr. Saul Statmin

Fair Hearing
Representative

oOo

HEARING OFFICER: On the record.

This Fair Hearing was requested by Mrs.
Estelle Posner. Mrs. Posner is not present
here today. The request for a Fair Hearing
was made by calendar, and, Charles Markwoitz,
on behalf of Mrs. Posner.

Am I correct on that, Mr. Weiss?

MR. WEISS: Yes.

HEARING OFFICER: The Appeal is from a
determination by the Oneida County of Social
Services, and the New York City Department of

1
2 Social Services, and there is no one present
3 from the Oneida County of Social Services;
4 there has been a summary which has been
5 submitted, at a previous time by that Agency.

6 The issue relates to the denial by both
7 Agencies, of an application for Medical
8 Assistance authorization, on behalf of Mrs.
9 Estelle Posner.

10 Am I correct on that, Mr. Weiss?

11 MR. WEISS: I believe so. Though I never
12 received that summary of the previous Hearing.

13 HEARING OFFICER: I have not checked my
14 record correctly. I understand there has been
15 a summary submitted.

16 MR. WEISS: Not to my knowledge.

17 HEARING OFFICER: The Hearing will be
18 conducted in the following manner: Each side
19 will present its case through the testimony of
20 witnesses and through the introduction of
21 documents.

22 Each side will have an opportunity to
23 question the witnesses for the other side.

24 Upon completion of the Hearing, the record
25 will be sent to Albany, where the Commissioner

1
2 of the State Department of Social Services will
3 render his decision.

4 My name is Michael Cimorelli, and I have
5 been designated by the Commissioner of the New
6 York State Department of Social Services to
7 conduct this Hearing.

8 Before we proceed into the taking of
9 evidence, as such, as to the eligibility of the
10 Appellant, or the determination of the Agency,
11 involved, I would like to go into several issues
12 which to me, relate to this problem: one, I
13 understand that Mrs Posner is presently at a
14 home in Utica New York; that she was placed
15 there by her husband.

16 Am I correct, Mr. Weiss?

17 MR. WEISS: I believe so.

18 HEARING OFFICER: Mr. Posner is not present.

19 I understand from a copy of a letter which I
20 have in my file, which is signed by, Maxwell
21 Posner, that he is objecting to this Hearing,
22 and he states in his closing paragraph, "I have
23 never asked for or do I wish to receive Medicare
24 for Mrs. Posner. I challenge the authority to
25 apply for Medicare for my wife, or having a

1
2 Fair Hearing on my behalf."

3 Have you seen this statement, Mr. Weiss?

4 MR. WEISS: I have not seen a copy of that.
5 You said that is a copy rather an original.

6 I object to that being used. It is im-
7 properly here, I was given it and there is no
8 relevancy, and in addition being incorrect.

9 HEARING OFFICER: I believe it is relevant
10 if a man is objecting to a Hearing. He is
11 legally responsible.

12 MR. WEISS: It is irrelevant so far as
13 it is a law who may govern or not govern. It is
14 quite clear under Section 366 that, Mrs. Posner,
15 is eligible. It is quite clear under Section
16 350 of the Department regulations that a
17 representative may apply, that is or by repre-
18 sentative expressly as expressed in writing.

19 The authorization form and application
20 show what he says is irrelevant.

21 HEARING OFFICER: Well, there is a Departme:
22 regulation 358.4 which deals with rights to a
23 Fair Hearing, and I will read part of it
24 the following persons shall be entitled to a
25 Fair Hearing. Applicants for or recipients of

1
2 Aid to Dependent Children, Aid to the Aged,
3 Blind or Disabled, Medical Assistance for needy
4 persons on Home Relief, or Veteran's Assistance
5 on the following grounds:" there are then six
6 paragraphs setting out the various grounds:
7 one, which an appeal may be taken.

8 Now, am I to understand that, Mrs. Posner's
9 brothers are applicants for, Mrs. Posner?

10 MR. WEISS: No, they are presenting her
11 case, for their eligibility for her.

12 HEARING OFFICER: In other words, they
13 have submitted an application for Medical
14 Assistance on her behalf?

15 MR. WEISS: They are now appealing from
16 that denial.

17 HEARING OFFICER: Where do they derive
18 the authority to want Medical Assistance for
19 their sister?

20 MR. WEISS: First, anybody may represent.

21 HEARING OFFICER: With their permission.

22 MR. WEISS: There is no requirements under
23 358.15A, and B, which I believe may be governed
24 in the authorization of the representative,
25 there is an explicit permission. I am prepared

1
2 to put one or both, either of the, Markweitz's
3 to testify the nature of their communication
4 with their sister, which led them to believe
5 that she wants to remove herself from the
6 hospital, to be near them, to effectuate
7 everything possible of the necessary things
8 to get her Medicaid, that even authorization
9 to so act for her in again and this place in
10 particular, and that is even more than is
11 required under the rules.

12 HEARING OFFICER: Are you telling me a
13 near relative such as a brother may take a
14 woman away from the responsibility of her
15 husband without his permission?

16 MR. WEISS: There is nothing about taking
17 her away from his responsibility.

18 The only question is, she is eligible for
19 Medicaid, Medical Assistance, and the answer is
20 --- nothing to do with the responsibility if in
21 fact she is on Medical Assistance, and there is
22 a question, perhaps the husband should be more
23 responsible, that is then the Welfare's Depart-
24 ment, to go and deal with him directly. This is
25 a question of whether she is eligible. The

1
2 answer is she is eligible. The Application was
3 improperly denied, and I am prepared to prove it.

4 HEARING OFFICER: Well, I am going to
5 tell you that the Commissioner will, of course,
6 review the record, and it will be his decision,
7 as to whether or not, Walter and Charles
8 Markwoitz, may act here or come in here. It is
9 also his decision as to whether or not they
10 have the right to ask for a Fair Hearing, on her
11 behalf.

12 He will also, of course, go into everything
13 else that is taken here, but his decision, I
14 can't answer. I don't make it, but I would
15 like you to understand what it could possibly
16 be.

17 MR. WEISS: Well, let me point out 350.2.

18 HEARING OFFICER: Just a moment! Is,
19 Mrs. Posner, capable mentally of expressing any
20 desires in this respect?

21 MR. WEISS: At this point, apparently, not.
22 When this process was started, apparently so, if
23 you look at Section 350.2, at the applicant
24 himself, any adult member of his family, any
25 person acting in his behalf, and any other

1
2 Agency or institution, the application was
3 properly made, and it largely deals with a
4 denial, and can be told with a hearing, and
5 if they properly represent her interest.

6 The question if a factual one, is she
7 eligible or not. She is eligible, because she
8 is indigent.

9 HEARING OFFICER: I am not saying that
10 the application cannot be made in her behalf,
11 what I am saying, do you have anything to
12 satisfy me that she has acquiescent in this,
13 or had acquiescence in this; without that, I
14 am sure that there is no stand here.

15 MR. CAULDWELL: On behalf of the Home,
16 I have a copy of a letter, and it was written
17 to the Department of Social Services by the
18 doctor at the Home, as to her condition.

19 I don't have the original.

20 You have a copy, maybe I have it here.

21 All right.

22 MR. WEISS: I present no documents what-
23 soever. I like to state two things; the first
24 is that the rules as far as an application do not
25 require doctoring of acquiescence or official

1
2 authorization, with the contrary, anybody^{10.}
3 able to apply and largely anybody is able to
4 appeal.

5 Secondly, I am prepared to put in either
6 or both of the Markwoitz's on the stand to
7 testify. In which their sister communicated
8 to them that she wants them to go ahead and
9 do certain things, which include the application
10 for Medical Assistance. to them. for the
11 statutory authorization they need.

12 HEARING OFFICER: Can they do it, in the
13 face of a husband who says no?

14 MR. WEISS: There is nothing in the rules
15 that prevents them to do that. The question of
16 eligibility has nothing to do with the option
17 of a husband, nor can you point me anything in
18 the regulations or rules that say to the
19 contrary.

20 HEARING OFFICER: Can you give me any
21 legal authorization for any one to walk into a
22 family, and remove a member of that family who
23 is legally responsible for that person.

24 MR. WEISS: She is being cared for in an
25 institution, where she does not want to be. Nor

1
2 does the rest of her family want her to be and
3 the provision rule 350.1 and 350.2 ---

4 HEARING OFFICER: I am not speaking about
5 an application. I am getting past that. Who
6 has the authorization to determine where this
7 woman will be placed, the brothers or her
8 husband?

9 MR. WEISS: That is not a question before
10 this tribunal.

11 HEARING OFFICER: I think it is certainly.

12 MR. WEISS: Where is it in the Fair Hearing
13 Notice, in the Notice the denial, the denial of
14 the eligibility established under 366, it does
15 not speak at all on the consent or participation
16 of an office or desire location. The only
17 question is, in fact, she is eligible. We are
18 prepared to present what she has communicated
19 with the, Markowitz's and too, the facts of the
20 eligibility.

21 The fact that a husband, you have a copy,
22 a purported copy, by her husband --- has no
23 relevancy. Can you point to me anything in the
24 Statute that makes that relevant?

25 HEARING OFFICER: If, Mr. Posner, is

1
2 financially able to support his wife, is he not
3 provided to do so?

4 MR. WEISS: There is a separate provision
5 under the Medical law, Medical Assistance, and
6 there is a legal responsible relative meaning,
7 Mr. Posner, again, the Medical Department must
8 proceed and shall proceed against him. We have
9 those options to do that.

10 HEARING OFFICER: I understand. Can you or
11 anyone else place a burden upon a person that
12 does not wish to assume that?

13 MR. WEISS: In the fact there is no Statute
14 that talks about it. It talks about the appli-
15 cation and liability. We are not concerned with
16 liabilities. We are concerned with the applicati

17 HEARING OFFICER: You are saying that one of
18 those two Agencies should assume responsibility
19 for, Mrs. Posner, and turn around and tell Mr.
20 Mr. Posner we have no care for your wishes. You
21 are going to pay for it?

22 MR. WEISS: We have no option to that. The
23 question is whether or not she is eligible.

24 HEARING OFFICER: Doesn't he have anything
25 to say about this?

1
2 MR. WEISS: There is nothing in the law
3 that says he has to. If you have a client ---
4 in the Statute, the fact that the law finds
5 eligibility without reference to a responsible
6 relative, or possible responsible relative.

7 Unhappiness, becomes the law; clearly that
8 oncemore, there is a rationale and we have a
9 woman who is being kept away from her family,
10 and has been denied Medical treatments in the
11 past, because of her husband.

12 HEARING OFFICER: Are you saying she is
13 not getting proper care?

14 MR. MARKWOITZ: She is getting custodial
15 care. She is being denied the medical attention.
16 If she was in New York City here, her husband
17 is indifferent to this.

18 MR. CAULDWELL: May I say something?

19 HEARING OFFICER: You are here representing
20 the Home?

21 MR. CAULDWELL: I came primarily as an
22 observer, and if there are statements made
23 like that, I want to refute that.

24 MR. WEISS: I want to make a point that
25 the rationale that cannot block an application

1
2 by the eligible . . . persons by the protest of
3 someone responsible is that people who are
4 eligible need the Assistance, and they should
5 have the care, and they should not try to avoid
6 the responsibility by authorization. He
7 should pay for her needs, and she should get
8 proper placement and if the Department feels
9 he should be liable, but it is his option.

10 HEARING OFFICER: Excuse me, you are
11 making a statement which I think is very strange
12 He is not here to defend himself.

13 MR. WEISS: You are introducing wrong
14 conclusions into evidence. A copy of that
15 proports to be evidence, and it is irrelevant
16 and should not, because of rationale.

17 HEARING OFFICER: I think the rights of
18 a husband certainly come into place here.
19 You simply cannot do away with that.

20 MR. WEISS: It does fend on what sort of
21 right he had. He had no right to put her in
22 the Home.

23 HEARING OFFICER: Mr. Weiss, you cannot give
24 a person one right and impose a burden.

25 MR. WEISS: What right are we talking
about?

1
2 HEARING OFFICER: We are talking about a
3 duty of supporting.

4 That is your personal opinion.

5 You can make a statement at this point.
6 I am simply arguing the legal points with your
7 attorney, because they are certainly going to
8 be taken into consideration.

9 I wish him to know clearly and whoever
10 is in this room I do not make the decision.

11 It is made by the State Commissioner of
12 the Department of Social Services, in Albany,
13 and he will rule on every aspect of the matter.
14 It will come out over his name, in a written
15 decision.

16 MR. CHARLES MARKWOITZ: That we understand.

17 HEARING OFFICER: I think we have covered
18 the preliminary matters.

19 MR. WEISS: Do you have to take testimony
20 from either or both of these, the Markowitz's?
21 who have communicated with Mrs. Posner, who is
22 authorizing them or are you willing to accept
23 the characterizations I have offered you?

24 HEARING OFFICER: I said if you wish to
25 put it in, I will take it.

MR. WEISS: Do you want to do it now or later?

HEARING OFFICER: I would like to ask Mr. Statmin, what information his Agency has. Mr Statmin is here as a representative of the Bureau of Medical Assistance, the Department of Social Services Bureau of Medical Affairs.

S A U L S T A T M I N, called as a witness on behalf of the Agency, was examined and testified as follows:

EXAMINATION BY

HEARING OFFICER:

Q You may proceed for the Agency, Mr. Statmin.

A Yes Let me first state, the first time my office was notified of this Fair Hearing, was last week, in that we were told that a Fair Hearing was scheduled at this date, at this time.

We have never received written notification of this Fair Hearing; nor have we received either in writing or any other form, the complaint or request for a Fair Hearing by Mrs. Posner, or even in her behalf, in any other way by the State Department of Social Services, Mrs. Posner, or anybody acting on her behalf.

Q Do you have an application?

A No, I received the Bureau of Medical Assistance, that

2 is concerned with the eligibility for Medicaid or Medical
3 Assistance for or within the City of New York area.

4 Until September of 1973, my office has not been in-
5 volved directly with eligibility for nursing homes,
6 chronic care facilities or public homes or infirmary care.

7 Our records show that there is no application, or
8 record of an application for Medical Assistance on the
9 behalf of Estelle Posner, at the Bureau of Medical
10 Assistance, at the New York City Department of Social
11 Services.

12 Q In other words, you are saying your records do
13 not disclose any application made to the City of New York,
14 the Department of Social Services, for Medical Assistance,
15 either by or on behalf of Mrs. Posner?

16 A That is right. As far as Medical Assistance, in the
17 community of New York City, or for Medical Assistance as
18 an in-patient in a hospital in New York City.

19 HEARING OFFICER: Mr. Weiss, would you
20 know if an application was made to the City of
21 New York?

22 MR. WEISS: The only application that has
23 been made thus far has been up in Oneida County
24 and was denied there, and this is an appeal
25 from us, but we will have testimony anyway, on

the participation from New York City.

MR. STATMIN: Well, I must request some sort of a deferral, in this participation, since you state that no application was made to New York City, made in, Oneida County.

So, the only complaint or grievance you have is action taken by the Oneida County?

MR. WEISS: Denial of the application, who is responsible at what level of authority, it is a State-wide program.

MR. STATMIN: It is a State-wide program. The only action taken by any locality or Agency in Oneida County.

HEARING OFFICER: They cannot bind any other Agency.

MR. WEISS: Exactly, and they apparently did not choose to be here, or have a representative

MR. STATMIN: There was mention of a summary that was submitted by Oneida County?

MR. WEISS: I never received a copy of it. There may be such a summary.

MR. STATMIN: May I ask whether a Hearing had been scheduled in Oneida County?

MR. WEISS: Yes, initially, there had been,

1
2 because people who testified were there, and
3 he transferred it down here.

4 MR. STATMIN: Was there any testimony
5 given in Oneida County?

6 MR. WEISS: No, that Hearing was transferred
7 down here; since the last Hearing, the transcript
8 was lost.

9 MR. CAULDWELL: The Department made a
10 ruling up there. It does not say it was based
11 on a Hearing.

12 MR. WEISS: It has never been a Hearing
13 ruling, there has been a denial of the appli-
14 cation by the local county and this is what
15 we are appealing from.

16 MR. CAULDWELL: But, there was a decision
17 by the Department.

18 MR. STATMIN: There was a decision by the
19 Department of Social Services, in Oneida
20 County? We agree on that?

21 MR. WEISS: Right.

22 MR. STATMIN: Do you have a copy of that?

23 MR. CAULDWELL: I have one.

24 MR. STATMIN: Mr. Cauldwell has one. Does
25 the State Department have one, Mr. Dimorelli?

1
2 HEARING OFFICER: I don't see a copy of
3 a denial.

4 MR. CAULDWELL: It was addressed to Mrs.
5 Posner, at the Home.

6 HEARING OFFICER: I have some original
7 letters and some copies here that I am going to
8 show you in a moment, Mr Weiss.

9 MR. WEISS: Again, I object to the use,
10 whether it hurts me or not, I object to any
11 use of documents that are not the originals.

12 HEARING OFFICER: You are objecting to
13 anything that is not original?

14 And that file has been lost. I think
15 that it will be sufficient for our purposes
16 at this Hearing, to accept copies of documents.

17 MR. WEISS: That is compounding incompet-
18 ency with the procedure. Clearly, we do not
19 know what was in that file before, or have
20 any evidence what we call the, best evidence
21 rules here, and there are original letters.
22 So, there is something.

23 HEARING OFFICER: I will show you what I
24 have here. I have here a letter from the
25 Oncida County of Department of Social Services

1
2 Which is dated August 30th, 1973, addressed
3 to the New York City Department of Social
4 Services at 1450 Western Avenue, Albany,
5 New York. And it is regarding the Fair Hearing
6 and it reads: Fair Hearing, Charles and Walter
7 Markwoitz, for Estelle Posner. The letter I
8 will show you. There were documents which
9 came with it. I will also show you them.

10 MR. WEISS: I also like to point out
11 these should have been given to me before
12 this Hearing, and they are admissible on those
13 grounds, as the rules require.

14 HEARING OFFICER: If you wish to have a
15 copy of whatever is in this file, I will adjourn
16 the matter and have it rescheduled at which
17 time the documents contained in this file will
18 be copied and submitted to you.

19 MR. WEISS: I believe that is not a
20 proper remedy, because it is too difficult to
21 have an adjournment. We must go ahead, but
22 the Department has failed its obligation to
23 provide me with copies, and therefore, they
24 should be excluded.

25 HEARING OFFICER: Now, I will give you the

alternative. You can request an adjournment of the Hearing.

MR. WEISS: It will work a hardship. It will not be accepted and it is appropriate to have documents that were not present before.

They
HEARING OFFICER: Were documents that were addressed to my Department, and I think they belong to my Department.

MR. WEISS: The rules also require that they be shown to me before.

HEARING OFFICER: I will recess and give you time to study.

MR. WEISS: I would like to have that, too. I would like to do my own research, and also to be aware of my right to have them in accordance with the Rules prior to this Hearing.

HEARING OFFICER: You are entitled to all your rights, which are reserved under the law, and I certainly am not in any way trying to foreclose you. I will recess for 5 minutes, and let you look at what I have here.

We will now go off the record for 5 minutes.

HEARING OFFICER: On the record.

1
2 Have you had an opportunity to examine
3 the documents which I handed you?

4 MR. WEISS: Yes.

5 HEARING OFFICER: I note and I think
6 you mentioned while off the record, a number
7 of these documents are letters, which you
8 yourself had drafted and in relation to
9 securing a Hearing here; is that correct?

10 MR. WEISS: That is correct.

11 HEARING OFFICER: Are we ready to proceed?

12 MR. WEISS: I also believe, through no
13 fault of yours, there were other letters, and
14 correspondence, and I suppose they are in the
15 other file?

16 HEARING OFFICER: Yes, I was in contact
17 with my office by phone yesterday. My office
18 in Albany, and I have instituted a search for
19 the previous transcript of the Hearing, which
20 was held to see if that was not attached to
21 the file. It is possible that they may have
22 that transcript.

23 MR. WEISS: I don't think you have the
24 transcript. I bought an article seven-eight
25 to get it. They said they couldn't find the
notes.

1
2 HEARING OFFICER: I hope we can find
3 the original file. We will go ahead. We are
4 to the point where you stated that the appli-
5 cation was made to Oneida County, and was
6 denied by the County.

7 MR. WEISS: We have summarized that decisio-
8 on exactly two grounds: one, is where she
9 resides, and the other is making use of resources.

10 Primarily, I'd like to point out first,
11 that the decision in the Hearing summary. are
12 incorrect to numbers. When they said 360.8.

13 I believe they were referring to 360.9.

14 Let me also say as per a legal position
15 the legal position we urged on that both
16 grounds are wrong. The first ground current
17 residence and this is a state-wide application,
18 and which County belongs ultimately is an
19 internal matter. And it is irrelevant to
20 where the application was made.

21 HEARING OFFICER: May I clarify that?

22 If I may? What they are saying is that
23 they did not deny. I believe at this point,
24 that she is ineligible for Medical Assistance,
25 on the ground that you are raising, which is

1
2 residency by the Agency. That she is not a
3 resident of that County, and that County of
4 her residence is responsible for her care;
5 in the event she is eligible for Medical
6 Assistance.

7 MR. WEISS: But, this is not a ground to
8 deny her application, saying that she is in-
9 eligible. The fact that she applied for one
10 County, to another, is irrelevant to her eli-
11 gibility. The eligibility was denied on
12 insufficient grounds.

13 HEARING OFFICER: Well, she is not a
14 resident in that County, they do not have to
15 grant Assistance to her.

16 MR. WEISS: The application says it is a
17 standard program, for whatever community ends
18 up to reimburse. This is an argument to be
19 made, that she is a resident there subject to
20 a Supreme Court decision, including the Supreme
21 Court decision, Cops vs. Shapiro, where a
22 person in the mental house, Minnie Harold, a
23 companion case, and she was also in a mental
24 house. She was considered a resident during
25 the time she was in the hospital. I represented

1
2 Minnie Harold. I was one of her attorneys.
3 Another reason all sources must be utilized.
4 360.8 is not the appropriate reference, because
5 under the charter, two of the rehabilitation
6 laws, section 249.11 is quite clear that a
7 recipient has a right to choose the provider
8 of Medical Assistance. The fact that they have
9 to been one medical facility, they could go to
10 another one. What the full resources means
11 you have to take advantage of what you have,
12 where you are. You do not have to be chained
13 to one place. For 249.11, it would clearly, be
14 unconstitutional and it would prejudice the
15 freedom of a traveller and infringe upon
16 family privacy.

17 So, 249.11 recognizes the constitution of
18 compulsive situations, the fallacy is a misin-
19 terpretation of 3499 thus utilized the grounds
20 that advised which are properly. The only
21 ground before this tribunal is the appeal, not
22 the denial. Both are clearly wrong under the
23 law, and I believe references to these sections
24 and references to the Court decision make it
25 perfectly clear.

1
2 MR. CAULDWELL: I have a copy of the
3 decision in Oneida County, the ground of the
4 denial of the decision stated on the bottom.

5 There is only one ground.

6 HEARING OFFICER: Mr. Weiss, have you
7 seen a copy?

8 MR. WEISS: No, I have not.

9 HEARING OFFICER: This is dated March
10 14th, 1973, and is addressed to, Estelle Posner,
11 at the Masonic Home, Bleecker Street, Utica
12 New York.

13 MR. WEISS: That was not sent to the
14 representative who made the application.

15 MR. CAULDWELL: Mr. Weiss is not purporting
16 to be appealing from that decision, I assume he
17 has seen a copy of it.

18 MR. WEISS: No, I was told there was a
19 denial. It said client is not eligible, living
20 in Masonic Home. That is precisely what they
21 have elaborated.

22 MR. STATMIN: Mr. Weiss, why was the
23 application made to Oneida County?

24 MR. WEISS: Because, that is where she
25 resides.

1
2 MR. STATMIN: You say she is a resident
3 of Oneida County?

4 MR. WEISS: Yes, and in a number of
5 other cases, you require residency, if you
6 are in a hospital or not.

7 HEARING OFFICER: I will accept a letter
8 a copy of a letter from the Oneida County
9 of Social Services, which is dated March 24th,
10 1973, and addressed to Estelle Posner, at the
11 Masonic Home, Bleecker Street, in Utica, New
12 York. And I will introduce and accept on
13 behalf of the Home, and it was introduced, by
14 Mr. Cauldwell.

15 Off the record.

16 (Discussion held off the record.)

17 HEARING OFFICER: On the record.

18 While we were off the record, there was
19 a discussion between Mr. Statmin and which has
20 to do with the residency, and the division of
21 the State in the Social Services district.

22 Well, let's get on now.

23 Mr. Weiss, where did Mrs. Posner live before
24 she went into the Masonic Home?

25 MR. WEISS: Why don't I put Mr. Walter

1
2 "Markwoitz, on and go on from there.

3 HEARING OFFICER: Very well, it is not
4 necessary to swear the witness.

5 W A L T E R M A R K W O I T Z, called as a witness on
6 behalf of the Appellant, was examined and testified
7 as follows:

8 EXAMINATION BY

9 MR. WEISS:

10 Q Mr. Markwoitz, can you tell us where your
11 sister was residing before she went into the Masonic
12 Home?

13 A She lived with her husband at 6700 92nd Street,
14 Flushing in Queens.

15 Q For how long has she lived there?

16 A About eight years.

17 Q Did she go from that home directly to the
18 Masonic Home?

19 A No, about a week before she was brought to my
20 mother's residence to stay.

21 HEARING OFFICER: Where is this?

22 MR. WALTER MARKWOITZ: In the Bronx.

23 Q Who brought her to your mother's residence?

24 A Mr. Posner.

25 Q Why did he bring her there?

1

30.

2 A He claimed he could not take care of her alone.

3 Q How did she get there from the Masonic, to your
4 mother's home?

5 A They came with their son and daughter and said
6 that my sister was going to be taken care of at the
7 Masonic Home up in Utica, let's go and pack your things,
8 and away she went.

9 Q And roughly, to the best of your knowledge,
10 was she admitted to the Masonic Home?

11 A To the best of my recollection, on August of 1971.

12 Q Has she been there since?

13 A Yes, sir.

14 Q Have you had occasion to visit her?

15 A Very very often.

16 Q Can you tell us roughly how often? Once or
17 twice a month?

18 A I have two brothers, and we rotate each visit. She
19 is seen roughly about every three weeks, by either myself
20 of my brother, Charles. My brother, Max, and my mother,
21 generally goes when we visit my sister. So all in the
22 two years, or twenty-six months, I venture to say we
23 have been there at least sixty times.

24 HEARING OFFICER: Excuse me, please. You
25 or one of your brothers, approximately once a

1
2 week --- what I am saying is that either once
3 a week; I don't mean visits.

4 MR. WALTER MARKWOITZ: Not that, approx-
5 imately, I would say every three weeks.

6 HEARING OFFICER: Every three weeks? One
7 of the members of the family would fly up there
8 or drive up there, or go by bus or train?

9 MR. WALTER MARKWOITZ: Yes.

10 EXAMINATION (CONT):

11 Q During the course of these visits, have you
12 ever had occasion to discuss with your sister how she
13 felt about being in the Masonic Home?

14 A Yes, from the very first visit, she said, what am
15 I doing here. I want to go home. I don't belong here.

16 Q Did she ever discuss with you what you should
17 do in order to help her, so that she could have the wishes
18 fulfilled?

19 A Yes, she asked how she could get out of there, and I
20 told her I am doing the best. I am trying to get legal
21 counsel. I am not an attorney. I don't know how she got
22 up there in the first place. This was when she was
23 coherent enough to understand my conversation with her.

24 Q Can you describe to the best of your knowledge
25 what type of medical facilities Masonic Home has?

1
2 MR. CAULDWELL: I object to that. I don't
3 think he is competent to testify to that.

4 MR. WEISS: I asked him to the best of
5 his knowledge.

6 HEARING OFFICER: You are asking some
7 questions on the, you are getting opinions now.

8 MR. WALTER MARKWOITZ: I had a conversation
9 with the doctor up there, if you want to put this
10 in the record.

11 HEARING OFFICER: You may relate what your
12 conversation was with the doctor.

13 MR. WALTER MARKWOITZ: May I relate on
14 October of 1971, when she was there about two
15 months, I went up there purposely in the middle
16 of the week, so I could speak to the staff
17 physician, Doctor Johnston. My mother and I
18 were there, and spoke to him and he said, these
19 are the records that purport the state of your
20 sister's condition. He wouldn't show
21 them to me. He held them away at a distance.

22 I asked him if the facility could do anything
23 to help her, or is it designed to help her, and
24 he said no, we provide custodial care. He see
25 that she gets her meals on time, and if she has

1
2 a cold, that would be taken care of; other
3 than that, we do not have any technical faci-
4 lities. He indicated there were no medical
5 equipment to judge the severity of her
6 illnesses. We admitted her solely on the
7 basis which accompanied her when she was
8 admitted.

9 He said she could just as well be at
10 home, as up here, because we could do nothing
11 for her up here.

12 MR. CAULDWELL: I must object to that
13 whole line of testimony. I think it is hearsay.

14 MR. WALTER MARKWOITZ: This is a conver-
15 sation with Doctor Johnston.

16 HEARING OFFICER: It is hearsay, in some
17 respect. We do accept hearsay. Of course,
18 we must have other facts.

19 MR. CAULDWELL: It is not binding upon
20 Doctor Johnston, because he is not here to
21 answer.

22 HEARING OFFICER: Hearsay is taken, and it
23 is given the weight it deserves; in effect,
24 that is all.

25 EXAMINATION (CONT):

1

34.

2 Q During the course of these past two years, did
3 you have any knowledge as to how often Mr. Posner has
4 visited Mrs. Posner?

5 A Yes, because we visit so frequently, we have had
6 the opportunity to be acquainted with, Mrs. Evans and
7 Mrs. Buzzy, who are staff nurses. We ask them every
8 time, has Mr. Posner come, visited my sister, Mrs. Posner,
9 and no one has ever seen him up there over the course of
10 the twenty-six months that my brothers have gone up
11 there. No one has ever said they saw him. Once, perhaps
12 once, somebody might have seen him.

13 MR. CAULDWELL: Again, I must object to
14 this line of testimony. He is not competent
15 to say whether he has been there or not.

16 MR. WALTER MARKWOITZ: May I say this?

17 HEARING OFFICER: I will overrule your
18 objection at this point.

19 MR. WALTER MARKWOITZ: Sir, the staff knows
20 us by sight.

21 HEARING OFFICER: We won't have to go into
22 that.

23 EXAMINATION (CONT):

24 Q Could you tell us how far the Masonic Home
25 is from where you and your brothers and mother live?

1
2 A Yes, about 300 miles.

3 Q Do you know if your sister has any property or
4 assets, or savings or money at this moment?

5 A Well, I know she had a considerable amount of assets
6 when she lived with my brother-in-law. What happened,
7 I don't know.

8 Q Do you know if she has any assets now?

9 A As far as I know ---

10 MR. CAULDWELL: I object to that, because
11 I don't think he has the knowledge.

12 HEARING OFFICER: He said to the best of
13 his knowledge he knows. You gave two answers.
14 She has some assets, but you don't know whether
15 she has them now.

16 MR. WALTER MARKWOITZ: I am sorry. Right
17 now she has nothing.

18 HEARING OFFICER: How do you know that?

19 MR. WALTER MARKWOITZ: She has nothing.
20 She is in a room.

21 MR. STATMIN: Does anybody have the power
22 of attorney to represent Mrs. Posner?

23 HEARING OFFICER: There is somebody. We
24 went over that, there is nothing to be presented
25 to me. I was trying to get some authorization

1
2 for, Mrs. Posner to be represented here, as
3 I stated at that point, the Commissioner will
4 rule on that issue.

5 EXAMINATION (CONT):

6 Q Pursuant to that, under rulings 58.15 B, is
7 your sister capable of signing a written authorization?

8 A (No response)

9 HEARING OFFICER: Just a moment!

10 Wait until I have something here to show
11 medically that she is or is not. I cannot take
12 her word for it.

13 MR. WEISS: You have a letter saying that
14 she is incompetent.

15 HEARING OFFICER: I will take the letter
16 if you will accept it, because I will not
17 take his statement, because I don't think he
18 is medically capable of making that statement.

19 MR. WEISS: You can observe that is not
20 a medical judgement, it is a statement of
21 observation. You can see if somebody is
22 incapable of writing, if you give them a pencil.

23 HEARING OFFICER: Well, you are speaking of
24 their physical ability? Is that what you are
25 getting at?

MR. WEISS: Yes.

HEARING OFFICER: You can testify what you saw your sister do. The question again, please.

EXAMINATION (CONT):

Q Have you observed or tried to discuss with your sister signing her name to any documents?

A Recently, yes.

MR. CAULDWELL: May I ask at what point in time on that?

MR. WALTER MARKWOITZ: On my last visit. It was 4 weeks ago.

MR. CAULDWELL: That was October, September or October?

MR. WALTER MARKWOITZ: It was on a Saturday, I guess.

HEARING OFFICER: Just a moment! You are saying about three to four or five weeks ago? Now, what is it you wish us to know about her physical condition that you saw at that time?

MR. WALTER MARKWOITZ: She is incapable of writing.

HEARING OFFICER: What do you mean by "incapable of writing"?

MR. WALTER MARKWOITZ: I asked her a

Question, could you sign your name, and the pencil fell out of her hand.

HEARING OFFICER: You are speaking of a physical act, that you saw?

MR. WALTER MARKWOITZ: Yes, sir.

MR. WEISS: I have no more questions.

MR. CAULDWELL: I didn't intent to participate, but I can't let some of these statements go unchallenged.

MR. WEISS: Let the record reflect I offer no objections.

CROSS EXAMINATION

BY MR. CAULDWELL:

Q Mr. Markwoitz, when you go to the Home, do you go to the Supervisor's office and tell them you are there?

A No, at one time we stopped because he is not there on the weekends.

Q You could still go to the Administration Building and report you are visiting your sister.

A We could, but we don't.

Q You don't?

A The building where my sister is, and the Administration Building is half a mile away.

Q In other words, what I am asking you, do you go

right to the building where she is, so that the officials at the Home don't know you are there?

A Well, the registered nurses know she is there.

Q A moment ago, Mr. Posner, you said was never there. You don't know that at all?

A Mr. Cauldwell, the registered nurses on duty, Mrs. Evans, and Mrs. Buzzy, and several other nurses who know us, we think they have some standing in the facility, and they told us they never saw him.

Now, you can ask them.

Q You don't know of your own knowledge how many times, Mr. Posner was there?

A All I know, Mr. Cauldwell, is what they tell me. May I just continue for one second, sir?

Mrs. Evans, who is the floor nurse and has been on the floor with my sister about a year and a half, knows my mother. My mother calls very frequently. My brothers go very frequently. She has told us that, Mr. Posner doesn't exist.

Mrs. Buzzy who is now taking her place, a registered nurse, they were very few visitors.

MR. CAULDWELL: I object to that as being not responsive to my question.

HEARING OFFICER: I don't see what relevance.

1
2 "this has. We are getting second and third hand
3 opinions, or statements as to whether or not
4 he has been there, or is going there.

5 I see no relevance at this point, as to
6 his being there or not being there.

7 CROSS EXAMINATION (CONT):

8 Q I have one or two more questions I'd like to
9 ask.

10 Do you know how many years Mr. and Mrs. Posner
11 were married?

12 A Thirty three years.

13 Q They have two children, a son and a daughter?

14 A Yes.

15 Q Do you know their approximate age?

16 A Daughter born 1943, she is 30 years old, and the son
17 was born on 1947, this December will be 28 years old.

18 Q Do they live in the New York City area?

19 A I have no idea.

20 Q Have they been communicated with in reference
21 to this matter?

22 A Very indirectly.

23 Q Any reason why you have not?

24 A We don't know their number. It is unlisted The one
25 son is in California. We don't know where he is.

1
2 MR. CAULDWELL: I would like to get the
3 record straight. A record of property
4 assigned to Mrs. Posner, this is required when
5 they come into the Home.

6 MR. WEISS: I would like to have that in
7 the record. This will demonstrate she has no
8 assets.

9 MR. CAULDWELL: Whatever assets, it demon-
10 strates she has assigned to the Home.

11 HEARING OFFICER: Off the record.

12 (Discussion held off the record.)

13 HEARING OFFICER: On the record.

14 While we were off the record, there was
15 a discussion relative to a document, which I
16 have before me, and it is an assignment, which
17 bears a signature, Estelle Posner, which is
18 notarized and it is dated July 13th, 1971.

19 Mr. Weiss, is there something you wish to
20 say about this document?

21 MR. WEISS: Yes, I would like to have this
22 introduced into evidence, which indicates she
23 has no assets. This document assigns all
24 assets as of July 31st, 1971, in order to
25 establish her eligibility for Medical Assistance

as impoverished.

HEARING OFFICER: You wish this as an Exhibit?

MR. WEISS: Yes, please.

HEARING OFFICER: Any objections to it?

MR. CAULDWELL: I object to it being an Appellant's Exhibit.

HEARING OFFICER: I will accept and mark as an Exhibit produced into evidence, by the Masonic Home, and introduced by Mr. Cauldwell, the document is, Masonic Home Exhibit 2, for the Home.

(Above described marked as Exhibit 2 for the Home, in evidence, as of this date.)

MR. STATMIN: I have a question on the document.

MR. CAULDWELL: It is merely a copy, I have the original on file.

MR. STATMIN: What does it reflect as far as ---

MR. CAULDWELL: Well, some statements have been made that she was coerced into the Masonic Home, and she voluntarily assigned her property.

MR. WEISS: I don't know what relevancy this has.

1
2 MR. CAULDWELL: I have one more question.

3 Mr. Walter Markwoitz, the last time you
4 were there about four weeks ago, she was in-
5 capable of writing?

6 MR. WALTER MARKWOITZ: Yes, sir.

7 MR. CAULDWELL: What was her mental
8 condition at that time?

9 (No response)

10 HEARING OFFICER: Are you asking him for
11 his opinion?

12 MR. CAULDWELL: Let me rephrase it. I
13 will withdraw that question. Did she understand
14 what you were saying to her?

15 (No response)

16 MR. WEISS: I object to that.

17 HEARING OFFICER: Again, this is going to
18 call for an opinion or possibly a conclusion on
19 his part, whether she did understand or did not

20 MR. CAULDWELL: I withdraw that question.
21 I would like to offer into evidence a letter
22 written by Doctor Johnston of the Masonic Home.
23 A copy of this was presented to the Supervisor
24 of the Home, regarding Mrs. Posner, dated
25 August 31st, 1971, in which the doctor states

her mental and physical condition.

MR. WEISS: Could I inquire why we don't have the original of that?

MR. CAULDWELL: Because it went to the Superintendent of the Home.

HEARING OFFICER: The letter to Mr. Pollicar was dated September 7th, 1973.

Off the record.

(Discussion held off the record.)

HEARING OFFICER: On the record.

Mr Weiss, do you have any objections to this letter being introduced into evidence, on behalf of the Masonic Home?

MR. WEISS: No.

HEARING OFFICER: I will accept and mark as Exhibit 3, for the Masonic Home, a letter bearing the date August 31st, 1973, and it is a copy of a letter, I should say, and addressed to William Brenizer, the Superintendent at Masonic Home, Utica, New York. It is from a Doctor A. B. Johnston, Medical Director.

(Above described marked as Exhibit 3, for the Home, in evidence, as of this date.)

MR. STATMIN: And I pursue a series of

1
2 questions concerning the reasons why, Mrs.
3 Posner was transferred to Masonic Home, as
4 opposed to seeking care in New York City, or
5 any other jurisdiction?

6 HEARING OFFICER: No, I have no way of
7 knowing why or what happened.

8 MR. STATMIN: I am asking Mr. Walter
9 Markwoitz, since he was involved with his
10 sister's care.

11 MR. WEISS: Why is that relevant to this
12 Hearing?

13 MR. STATMIN: I am interested why this
14 facility was considered for her care?

15 MR. WEISS: What would that have to do
16 with her eligibility for Medical Assistance?

17 MR. STATMIN: It fixes New York City for
18 the medical eligibility, and her constituency.

19 MR. WEISS: I submit it is irrelevant.

20 HEARING OFFICER: I don't see the relevance
21 at this point. Do you have any other questions
22 of Mr. Walter Markwoitz, Mr. Weiss, or Mr. Charles
23 Markwoitz?

24 MR. WEISS: No. I would like to examine
25 Mr. Charles Markwoitz.

1
2 C H A R L E S M A R K W O I T Z, called as a witness on
3 behalf of the Appellant, was examined and testified
4 as follows:

5 EXAMINATION BY

6 MR. WEISS:

7 Q You heard your brother's testimony, is there
8 you would like to add to it, or anything you would like
9 to say?

10 A No, by and large, my brother has stated the situation
11 as it exists. Her medical condition, the frequency of
12 our visits, her pleasure of seeing us.

13 Unfortunately, she cannot express herself the way
14 she was able to when she was first admitted, but the
15 look on her face ---

16 Q Were you present when, Mr. Posner came by to
17 take Mrs. Posner to the Masonic Home?

18 A Yes, it took place on a Sunday. Mr. Posner came, and
19 took my sister into the bedroom, spoke to her, and it was
20 impossible not to hear her and the conversation and the
21 gist of it.

22 It was ---

23 MR. CAULDWELL: I object to the conversation
24 because between two other persons.

25 MR. WEISS: I think it is very relevant,

1
2 what her anticipation was, to want their
3 authorization. She wants them to get her,
4 the reason implied is that she went up there
5 with defeatist expectations. I want him to
6 speak about the expectations he heard at that
7 time.

8 MR. CAULDWELL: Unless, Mr. Charles
9 Markwoitz was actually in their presence and
10 heard this conversation.

11 Where were you, Mr. Charles Markwoitz?

12 MR. CHARLES MARKWOITZ: Three feet away.

13 HEARING OFFICER: Mr. Markwoitz, you heard
14 your sister and her husband discussing her
15 going to the Home?

16 MR. MARKWOITZ: Yes.

17 MR. CAULDWELL: Before we continue, he
18 said a while ago, Mr. Pcsner took his wife into
19 the bedroom. He said he overheard. I don't
20 know how he overheard

21 MR. MARKWOITZ: I was just from here to
22 here.

23 HEARING OFFICER: In other words, Mr.
24 Markwoitz, your sister and your brother-in-law
25 were eight to ten feet in your sight?

MR. CHARLES MARKWOITZ: Yes.

EXAMINATION (CONT):

Q To the best of your knowledge, what did you overhear between them?

A My brother-in-law told my sister don't worry, they are going to take good care of you. They are going to help you and make you better.

Q Anything else?

A That was the general tone of the conversation. The next morning they came for her, Monday.

MR. STATMIN: Who came?

MR. CHARLES MARKWOITZ: The daughter and husband, and the son was in California.

HEARING OFFICER: The daughter and the son came and took her and brought her to Utica?

MR. WALTER MARKWOITZ: I have one statement to make. Mr. Cauldwell mentioned something before about insinuating that some ways she was coerced into going up there. She was persuaded at the time, because she wanted to get better, and he told me that she probably would have to be up there more than six or seven months, because of the type of care she would get. The

1
2 would give her medication. They would give her

3 MR. CAULDWELL: I object.

4 MR. WEISS: You have a legal objection?
5 State the legal objection.

6 MR. CAULDWELL: I think this witness is
7 incapable of testifying to a subject of this
8 sort.

9 HEARING OFFICER: I don't see the relevance.
10

11 MR. WEISS: The relevancy, why would she
12 authorize them to remove ^{her} from Masonic Home,
13 and apply for Medical Assistance? This is
14 the motivation because of her defeated expect-
15 tations by the statement by her husband, and
16 her family, and herself.

17 HEARING OFFICER: Mr. Weiss, we haven't
18 gotten this far yet. Where do your clients
19 wish to take their sister?

20 MR. WALTER MARKWOITZ: I would like to
21 have my sister in a nursing home in the borough
22 of Queens. So, we could visit her. She could
23 see us and we could see her, and as I stated
24 before, she is 300 miles. My mother is 85
25 years old. My sister expressed the very first
week that she did not want to be up there. She

1
2 "is unhappy. I can see it in her eyes.

3 MR. CAULDWELL: I object.

4 W A L T E R M A R K W O I T Z, re-called as a witness
5 on behalf of the Appellant, was further examined
6 and testified as follows:

7 EXAMINATION BY

8 HEARING OFFICER:

9 Q Mr. Markwoitz, when you say, each time that
10 you have seen your sister, could you tell me her physical
11 condition? Was she in your opinion in clean clothing?

12 A Yes.

13 Q In your opinion, did she look as if her
14 physical needs were being met?

15 I say physical, such as change of clothing, food,
16 rest and material things?

17 A Yes.

18 Q Now, if your sister is moved to a home in New
19 York City, is it in the belief that there is medical
20 assistance available in New York City, which she is not
21 receiving where she is now; that will possibly help her
22 own condition, mentally?

23 A It is my belief, yes, sir.

24 MR. STATMIN: When you say mental assistance
25 you mean medical care?

HEARING OFFICER: I mean medical care.

EXAMINATION (CONT):

Q Do you believe there is more care available here which is not available where she is?

A Yes.

Q What type of care, please?

A Neurological care.

Q You believe it is not available where she is?

A I know it is not available.

MR. CAULDWELL: I object to that.

Q How do you know it is not available, have you inquired?

A Yes, sir. We have inquired, and I have measured the type of care that is available.

Q Are you going to place your sister in a medical institution or a nursing home?

A If we were successful, we would place her in a hospital, and determine the extent of her illness, and if anything can be done for her. Doctor Johnston told me and my brother that the Home where she is now cannot do anything. As a matter of fact, they don't know or have the equipment.

MR. CAULDWELL: I object to the statement.

Q Are you saying that the nursing home in New York

1
2 would be better equipped?

3 A I didn't say that, sir.

4 Q Then, how can you say that, sir?

5 MR. CHARLES MARKWOITZ: If she were here,
6 we would go directly to the Doctors to see her
7 in the nursing home.

8 Q Have you inquired from the medical authorities,
9 if you wish in the City of Utica, as to what care could
10 be given to your sister, or what programs could be had
11 for your sister up there, as to her condition or anything
12 along that line?

13 A No, sir.

14 Q In other words, you don't know what is available
15 there?

16 MR. CHARLES MARKWOITZ: We are not there
17 to supervise for her. She is there and we are
18 here.

19 MR. WALTER MARKWOITZ: I know all the
20 prominent doctors like in Saint Barnabas, only
21 located in New York City. I have Doctor Slamo,
22 who is a neuro-surgeon in New York City.

23 Incidentally, we have made an arrangement
24 to have her taken to Bronx Daily Medical Center
25 to the doctor.

1
2 Mr. Posner said no, he refused to release
3 her to see if their equipment was up to date.
4 I think it's related to where she would be
5 better taken care of.

6 With all due respect to Utica, as opposed
7 to New York City, which has probably one hundred
8 percent better facilities.

9 HEARING OFFICER: Is this your opinion?

10 You have nothing to verify this?

11 (No response)

12 EXAMINATION BY

13 MR. WEISS:

14 (Of Mr. Markwoitz, Charles)

15 Q Have you made an investigation as to where the
16 leading neuro-surgeons are in the United States?

17 A Yes.

18 Q Where have you located them?

19 A In New York City.

20 Q Any where else?

21 A Nowhere else.

22 HEARING OFFICER: Mr. Weiss, have they
23 made any investigation as to the neuro-surgeons
24 in Utica?

25 MR. WEISS: He testified. He inquired, and

1
2 that was where the best neuro-surgeons were,
3 and they are here in New York.

4 HEARING OFFICER: You also wish to have
5 your sister down here for availability?

6 MR. CHARLES MARKWOITZ: On a compassionate
7 basis. It's not that I want her down here. She
8 asked to come here.

9 MR. CAULDWELL: You didn't state that she
10 said that.

11 MR. CHARLES MARKWOITZ: About two years
12 ago, she could not ask me now.

13 When we talk to her now, her eyes flutter
14 and we see a little sparkle.

15 MR. CAULDWELL: That is purely speculative

16 MR. MARKWOITZ: She has her facilities.
17 She devours this.

18 MR. CAULDWELL: I object to this as being
19 irrelevant.

20 MR. WEISS: I have no more questions of
21 Mr. Walter Markwoitz. Do you have anything
22 you'd like to add, Mr. Charles Markwoitz?

23 MR. CHARLES MARKWOITZ: We mentioned the
24 fact that she would have access to better
25 medical care. And with all due respect she has

1
2 been very happy to see us on our visits, and
3 it is a pleasure that she derives from our
4 frequent visits, which are extremely expensive,
5 emotionally and physically.

6 I can verify that by the phone calls.

7 HEARING OFFICER: In other words, part of
8 your desire to have your sister down here, is
9 because it is a burden on you to go to see her?

10 MR. CHARLES MARKWOITZ: It is a burden
11 for her not seeing us.

12 HEARING OFFICER: You are not answering
13 my question.

14 MR. CHARLES MARKWOITZ: It deprived her
15 of our visits. If it wasn't a burden, she would
16 see us every day of the week.

17 HEARING OFFICER: It is a burden on you
18 to have your sister up there?

19 MR. CHARLES MARKWOITZ: Yes, very definitely;
20 sir.

21 HEARING OFFICER: You and your brother
22 believe as you have said before, there are
23 medical facilities here that can be used?

24 MR. CHARLES MARKWOITZ: Hopefully.

25 MR. WEISS: I have no more questions.

1
2 MR. CAULDWELL: I would like to make a
3 statement for the record.

4 This patient came to the Masonic Home,
5 Mrs. Posner, was previously in the Flushing
6 Hospital in the City in 1970 for a period of
7 approximately a few days, but she was under-
8 going ---

9 MR. WEISS: Are you testifying as a
10 witness?

11 MR. CAULDWELL: I am making a statement.

12 MR. WEISS: I object to this whole line.

13 MR. CAULDWELL: I have to lay a foundation.

14 HEARING OFFICER: Mr. Weiss, I am going to
15 overrule you.

16 MR. CAULDWELL: I have here before me a
17 photocopy of a hospital record, from Flushing
18 Hospital Medical Center, which shows a, Mrs.
19 Posner was in there for tests, and examinations
20 and X-rays, and I'd like to mark this for
21 identification. Also, I would like to state
22 and I don't think that Mr. Weiss will dispute
23 or anybody else there was an inquiry made of
24 sending X-rays, and records to a Doctor in
25 California, a Doctor Chater, and the Masonic

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2 Home agreed to this, and it should be done.

3 Mr. Posner also agreed. We have found
4 that the X-rays at the Masonic Home were not
5 available of her head. In fact, I don't think
6 there were any X-rays available. We sent to
7 this Doctor, and Mr. Posner, also agreed that
8 the records from Flushing Hospital, where I
9 think, he is employed by the way, could be
10 released to be sent to this doctor, and that
11 was the end of the matter.

12 I understand Friday something was told to
13 me today, Mr. Walter Markwoitz, you have been
14 in consultation with them, but this California
15 proposition did not go through, but Doctor
16 Slamo, took the part of Doctor Chater.

17 R O B E R T C A U L D W E L L, called as a witness on
18 behalf of the Appellant, was examined and testified
19 as follows:

20 EXAMINATION BY

21 HEARING OFFICER:

22 Q I am going to ask you some questions, Mr.
23 Cauldwell. Do you to your knowledge know if Mr. Posner
24 is contributing any money towards the care of Mrs. Posner?
25 A Yes, he is contributing up to since 1971, the sum of

1

58.

2 \$2,500.00...

3 MR. WEISS: Could you compile payments or
4 contributions?

5 MR. CAULDWELL: For the benefit of the
6 Home in general?

7 MR. WEISS: Clarify that, please?

8 MR. CAULDWELL: Contributions for the Home
9 for the benefit.

10 MR. WEISS: I object. To what purpose is
11 it being used. It appears to be a contribution
12 for the care of his wife. Is it the type of
13 contribution I could make to Albert Einstein
14 Hospital?

15 MR. CAULDWELL: For the general use of
16 the Home, it is for her benefit as well as
17 everybody else's.

18 EXAMINATION (CONT):

19 Q Does the Home bill at all?

20 A There are no bills. They are expected in indigent
21 status, and I find when I look over a copy of the record,
22 that she made, the application when she went into the
23 Home, she was the wife of a Mason, and no assets stated,
24 and she listed the fact that she had a son and daughter.

25 Q Mr. Cauldwell, is that Home licensed by the

1
2 State of New York?

3 A Definitely.

4 Q What type of license do you have?

5 A As far as the hospital is concerned, it used to
6 be a home and a hospital. So far as the hospital is
7 concerned, it is not licensed as a hospital as such,
8 as for performing operations, usually the care that goes
9 with a hospital, but it is licensed as a senior citizen
10 health facility.

11 It has an infirmary, and every service rendered
12 except for operations.

13 MR. WEISS: Who gave you the license?

14 MR. CAULDWELL: The State of New York.

15 MR. WEISS: What Department?

16 MR. CAULDWELL: I think the Department of
17 Health.

18 MR. WEISS: You don't know.

19 MR. CAULDWELL: This is my best recol-
20 lection. The Department of Health.

21 MR. WEISS: In other words, you have what
22 is called a hospital, part of the home?

23 MR. CAULDWELL: To the extent of treating
24 oral necessities and things of that sort, if
25 anything serious occurs, if an operation occurs

1
2 they send them to Utica.

3 EXAMINATION (CONT):

4 Q Is it a home entirely for senior citizens?

5 A No, there is a section that is.

6 Q What part of the facility is, Mrs. Posner in?

7 A In the infirmary or health facility.

8 Q As a licensed facility, your Home undergoes
9 periodic examination by the State of New York?

10 A Yes, sir. It is.

11 Q Your license is in order?

12 A Yes.

13 HEARING OFFICER: Now, to summarize
14 somewhat, Mr. Weiss, it is your contention
15 that Mrs. Posner may apply to the Oneida
16 County Department of Social Services for
17 Medical Assistance, in that that Agency is
18 required if she meets all eligible requirements
19 to issue such authorization that she may choose
20 what facility she wishes. Where she wishes to
21 stay; in that event she is unable to do this,
22 or even if she had the facility to do such a
23 thing, her brothers pay on her behalf, and
24 would make such an application in spite of any
25 and all options by her husband; is that correct?

1
2 MR. WEISS: That is factual text. Her
3 past and her relationship with the family,
4 that is more or less correct.

5 HEARING OFFICER: That there was such
6 an application made to Oneida County, and it
7 was denied, by that County. No application
8 has been made to New York City?

9 MR. WEISS: Not as of this moment. It is
10 my opinion that where you apply, this is a
11 State-wide eligibility as far as the Courts
12 are, this is an internal matter, and the law
13 is clear on that.

14 HEARING OFFICER: Mr. Statmin, is there
15 anything further you wish to present on
16 behalf of the New York City Department of
17 Social Services?

18 MR. STATMIN: No, we have nothing further.

19 HEARING OFFICER: Is there anything further
20 to be presented into evidence?

21 MR. WEISS: I believe none.

22 MR. CAULDWELL: No, unless you want to know
23 what the procedure is for getting into the Home?

24 HEARING OFFICER: I will take that.

25 MR. CAULDWELL: The statement was made

here a while ago by, Mr. Charles Markwoitz, as to the conversation in their Home, and next day they took her away.

The procedure is a little more detailed and takes a little more time than that. An application is filed at the request of the applicant's lodge, if it happens to be a member of the lodge itself; it was on behalf of the Master Mason's wife, the assignment of property assigned and the guests are also to sign a statement of rules and regulations which are read to them.

So, they know this takes a bit of time.

There is an investigation made by the members of the lodge, and the lodge agrees to be responsible if the applicant leaves the Home, and to take the applicant back at their expense: when all of this is ready, and there is room available at the Home, the lodge is notified and arrangements are made to take the applicant up to the Home, from that time, the Home, the applicant is under the care and jurisdiction of the Home.

For instance, lodging, clothing, without an,

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2 charge. So that, while it may appear that
3 the conversation occurred on one day, there
4 was a period of time for an investigation.
5

6 MR. CHARLES MARKWITZ: We know that.
7 There is also a question of the signature
8 involved here. There is a question in my
9 mind as to whether she was capable of signing
10 her signature legibly enough.

11 HEARING OFFICER: Mr. Cauldwell, before a
12 person is admitted to the Home, are they given
13 a medical examination to determine their
14 physical capabilities?

15 MR. CAULDWELL: Yes, and an examination
16 by the doctor as they arrive.

17 HEARING OFFICER: As to possible ailments?

18 MR. CAULDWELL: Yes, there is an appli-
19 cation by the local doctor.

20 HEARING OFFICER: Is there a psychiatrist
21 there?

22 MR. CAULDWELL: No, because we don't accept
23 psychiatric patients. If they require that
24 later on, they are sent to the proper place of
25 care. We do not apply psychiatric care.

HEARING OFFICER: I have before me, Doctor

1
2 Johnston's letter and he speaks of her physical
3 condition.

4 MR. CAULDWELL: He speaks of her mental
5 condition.

6 HEARING OFFICER: He states she has shown
7 progressive deterioration, mentally and physical

8 MR. CAULDWELL: You are probably wondering
9 why she has not been taken then to some place
10 else?

11 Well, the Home does most of the pertinent
12 arrangements. Most of the people are suffering
13 from severe senility, they cannot remember the
14 date of the week, or where their rooms are.

15 They let the people stay and they are
16 harmless to anybody. If they have a serious
17 case, if a person requires a straight jacket,
18 they necessarily must be taken to a place that
19 is equipped to take care of them.

20 HEARING OFFICER: So, your Home is presently
21 able to care for and meet the needs of Mrs.
22 Posner?

23 MR. CAULDWELL: Yes, indeed, she is
24 served her food into her room, and she is
25 fed when necessary. I believe she is incompetent

1
2 and she is being looked after in that respect.

3 MRS. BETTY MARKWICZ: In the meantime
4 she lost twenty pounds.

5 MR. WEISS: Are you aware of any neuro-
6 surgical facilities at the Home?

7 MR. CAULDWELL: As far as I know, there is
8 no neuro-surgical facility at the Home.

9 EXAMINATION (CONT);

10 Q Do you know anybody in the Home that has to
11 treat her; do they have any records of that having
12 been done?

13 MR. CAULDWELL: No.

14 MR. STATMIN: If a person requires
15 neurosurgery, or neuro-surgical examination,
16 wouldn't that patient be transferred to another
17 facility?

18 MR. CAULDWELL: Yes, a person requiring
19 an appendectomy ---

20 MR. STATMIN: Let's say a prolonged care
21 of neurological condition, would such a person
22 be transferred to another facility?

23 MR. CAULDWELL: Except in the doctor's
24 opinion, in this case there is not very much
25 that can be done for her.

1
2 MR. WEISS: Who would pay for the
3 treatment of the facility?
4

5 MR. CAULDWELL: Well, if a person is
6 transferred to another hospital for care, it
7 would be the responsibility of the Masonic
8 Home.

9 MR. WEISS: How often has this happened?

10 MR. CAULDWELL: I don't know. About long
11 care. I don't know about operations.

12 MR. WEISS: What about neuro-surgical
13 operations?

14 MR. CAULDWELL: This is out of my field.

15 MR. WEISS: You have no idea that this has
16 ever happened in the past?

17 MR. CAULDWELL: No, I do not.

18 HEARING OFFICER: Is there anything further,
19 gentlemen?

20 MR. WEISS: I believe no.

21 MR. STATMIN: No.

22 HEARING OFFICER: There being no further
23 testimony, the Hearing is closed.
24
25

November 1, 1973.

67.

I N D E X
WITNESSES

AGENCY

Saul Statmin

EXAM.

16

APPELLANT

Walter Markwoitz

DIRECT EXAM CROSS

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38

Charles Markwoitz

46, 53

Robert Cauldwell

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APPELLANT

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3 Letter dated 8/31/73

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C E R T I F I C A T E

STATE OF NEW YORK)

: ss
COUNTY OF NEW YORK)

I, MARIE HICKEY, a Shorthand Reporter and
Notary Public within and for the State of New York,
do hereby certify:

That the Fair Hearing in the matter of the
Appellant, ESTELLE POSNER, which was duly reported
by me, as hereinbefore set forth, is a true record
of the testimony given by such witness.

I further certify that I am not related to
any of the parties to this action by blood or
marriage, and that I am in no way interested in
the outcome of this matter.

IN WITNESS WHEREOF, I have hereunto set my
hand this 12 day of March, 1974.

MARIE HICKEY
MARIE HICKEY, Reporter.

